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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE LOUISIANA LAND AND EXPLORATION COMPANY,
Petitioner,

v.

TEXACO, INC.,
Respondent.

AMICUS CURIAE BRIEF OF THE STATE OF LOUISIANA IN SUPPORT OF PETITIONER

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February 3, 1987

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THE LOUISIANA LAND AND EXPLORATION COMPANY,
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MOTION OF THE STATE OF LOUISIANA TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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1. The Louisiana Supreme Court has interpreted and applied the Natural Gas Policy Act in a manner inconsistent with the rulings of this Honorable Court, the intent of Congress, and the interpretation of that Act by the Federal Energy Regulatory Commission.

2. The Louisiana Supreme Court erroneously applied the Natural Gas Policy Act by holding that the price paid by an end user gas purchaser to a producer-pipeline governs the royalty payments made by the producer-pipeline to its lessor.

3. The Louisiana Supreme Court's ruling is contrary

to the rulings of this Court and the Federal Energy Regulatory Commission.

4. Mover is the State of Louisiana which has a substantial interest in the outcome of this litigation.

5. Mover submits that it is a royalty owner under some of the Louisiana Land and Exploration Company leases subject to the Louisiana Supreme Court's ruling as well as a royalty owner under numerous other leases with Texaco Inc., which are affected by the Louisiana Supreme Court ruling and therefore has a direct interest in this proceeding.

6. Mover further submits that the issues presented are of national importance inasmuch as these issues affect natural gas pricing in a large segment of the national market.

7. Mover, the State of Louisiana, is entitled to file this brief without the written consent of the parties under Supreme Court Rule 36.4.

8. Accordingly, Movers desire to be allowed to file a brief as Amicus Curiae in the present proceeding in support of Petitioner's request that this Court grant a Petition for a Writ of Certiorari to the Supreme Court of Louisiana.

WHEREFORE, Mover prays that it be allowed to file a brief as Amicus Curiae in support of Petitioner in the proceeding now before the Honorable Court.

Respectfully submitted:

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AMICUS CURIAE BRIEF OF THE STATE OF LOUISIANA IN SUPPORT OF PETITIONER

THE STATE OF LOUISIANA submits this brief as amicus curiae in support of the Petition for Writ of Certiorari of the Louisiana Land and Exploration Company.

PRELIMINARY STATEMENT

The State of Louisiana is a major landowner and royalty owner. Like the Louisiana Land and Exploration Company, the State of Louisiana has royalty interests in a number of leases held by Texaco, Inc. The exploration, production, processing, distribution and sale of natural gas is a major industry in Louisiana. Therefore, decisions of the State and federal courts which bear upon natural

gas pricing affect the State of Louisiana both directly as royalty owner and indirectly through the effect of those decisions on the gas market in Louisiana.

ARGUMENT

The Louisiana Supreme Court has ruled in this case that the Natural Gas Policy Act (NGPA), 15 U.S.C. §§3301-3432, and specifically §105 of that Act, 15 U.S.C. §3315, controls the payment of royalties to the Louisiana Land and Exploration Company by Texaco, Inc. This ruling is erroneous in the following respects:

(1) The Natural Gas Policy Act of 1978 does not control the price upon which royalty payments are calculated.

(2) Assuming for the sake of argument that the NGPA does affect the royalty payments to a lessor by a producer-pipeline, then the Louisiana Supreme Court erred in applying §105 of that Act based upon sales contracts between the producer-pipeline and industrial end users.

1. The Natural Gas Policy Act is Not Applicable to Royalty Payments

The first issue raised by the Louisiana Supreme Court's ruling is whether the calculation of royalties due under the Louisiana Land and Exploration Company leases, which leases provide for the payment of royalty based on the market value at the wellhead, is controlled by the NGPA. The Louisiana Supreme Court erroneously ruled that the NGPA controlled the royalty payments. This holding is at odds with the decisions of the federal courts and pronouncements of the Federal En-

ergy Regulatory Commission (FERC). FERC has stated that it is without jurisdiction to control the price at which royalties are paid.[1]

This Court, in *Mobil Oil Corporation vs. Federal Power Commission*, 463 F.2d 256 (D.C. Cir.) cert. denied, 406 U.S. 976, 92 S.Ct. 2409, 32 L.Ed.2d 676 (1971), by its denial of certiorari in effect held that the Federal Power Commission under the Natural Gas Act lacked authority to regulate the amount of royalty paid by the lessee-producer to a lessor. Likewise, in *Bowers vs. Phillips Petroleum Company*, 692 F.2d 1015 (5th Cir. 1982) the Fifth Circuit recognized that the Federal Energy Regulatory Commission, under the NGPA, also lacked jurisdiction to regulate the amount of royalty paid by the lessee-producer to a lessor.[2]

The landowner's incentive for leasing and allowing oil and gas development on public and private lands is the consideration paid in the form of royalties, or a share of the production derived from those lands. There is therefore a significant public interest in protecting those lease contracts, in order to encourage mineral development. This public interest has been recognized by Congress by not applying the NGPA to royalty arrangements and by the Federal Energy Regulatory Commission in its refusal to assert jurisdiction over those arrangements.

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[1] See, for example, 49 Fed. Reg. 37,735 (1984) at 37,740, wherein the FERC states ". . . the Commission does not have jurisdiction over royalty interest owners, and, therefore, it cannot order royalty interest owners to make refunds [of amounts collected in excess of maximum lawful first sale prices] . . ."

[2] See also *Flowers vs. Diamond Shamrock Corporation*, 693 F.2d 1146 (5th Cir. 1982).

The Supreme Court of Louisiana, however, has ruled in this case that the federally mandated ceiling prices do control the payment of royalties. The State of Louisiana urges that this Court grant Louisiana Land and Exploration Company's petition for a writ of certiorari to review this question.

2. The Louisiana Supreme Court Misapplied Section 105 of the Natural Gas Policy Act

Even assuming that the NGPA should apply to royalty payments, the Louisiana Supreme Court erroneously used the gas sales contracts between Texaco and various industrial consumers in applying Section 105 of the NGPA (15 U.S.C. §3315). A brief description of the Texaco production and pipeline system will enable the Court to understand the error of this ruling.

Texaco produces gas from many fields in south Louisiana and delivers it, sometimes in excess of a hundred miles away, to many industrial customers along the Mississippi River and the western part of the State.

Texaco produces the gas from the Louisiana Land and Exploration Company leases and from State leases from leases of many private landowners and then transports the gas through its own pipeline or through its wholly owned subsidiary pipelines to many industrial customers and end users throughout the State. Texaco's gas sales contracts with the industrial customers merely provide that Texaco will deliver to the end user the contract volumes, but such contracts do not dedicate any particular well or field to the fulfillment of these gas con-

tracts. These contracts are known in the industry as warranty gas contracts, meaning that Texaco, as a corporation, guarantees that it will deliver the contract volumes regardless of whether it produces the gas or purchases the gas from some third party to fulfill the gas purchase agreement with the industrial customer. Under the warranty contract, no particular well or field is mentioned in the contract as being dedicated to the fulfillment of that contract.

Texaco takes Louisiana Land and Exploration Company's royalty share of the gas production and puts it in its industrial pipeline system where it is commingled with production from many other fields and leases and then sells it to a number of industrial customers. Under the mineral leases, Texaco is obligated to pay Louisiana Land and Exploration Company the current market value of the gas at the "wellhead" or in the field, depending on the specific lease language, regardless of the price at which Texaco sells the gas to the various industrial customers.

Texaco's warranty contracts allow Texaco at any time and from time to time to shift volumes of gas from one customer to another. They also leave Texaco free to market the gas from the subject leases to purchasers other than these industrial customers. There is no dedication of the subject leases to the Texaco customers. Gas from any source can be used by Texaco to supply these contracts. Similarly Louisiana Land and Exploration Company's gas can be sold elsewhere. In a similar case, a federal district court in Louisiana held that, although the producer-seller is restricted by §105 of the NGPA to the sales price under

a warranty contract, the royalty owner is not subject to the §105 price restriction.[3]

The *Hodel* Court reasoned that the federal landowner's gas was utilized *at the producer's election* to fulfill the producer's own low price warranty contract obligations. That Court found that the lessee was obligated to pay the federal government the price established by the Secretary of the Interior prior to the date of enactment of the NGPA even though the contract price received by Amoco was less. The *Hodel* Court further held that the NGPA did not impose a limit on the price Amoco was obligated to pay to the government as royalty.

This Court has also recognized that the wellhead transfer of gas is a separate transaction from the downstream delivery to a customer on a pipeline system. This Court held in *Public Service Commission of New York vs. Mid Louisiana Gas Company, et al*, 463 U.S. 319, 103 S.Ct. 3024, 77 L.Ed.2d 668 (1983) that the intracorporate transfer at the wellhead by a company's production division to the transmission division of the company could be considered a first sale under the NGPA. After this Court's decision in the *Mid Louisiana* case, the FERC, in Order 391 [18 CFR 270.203(b)(2)] established the wellhead as the "first sale" under NGPA in an intracorporate transfer from the producing division to the transmission division.

The Louisiana Supreme Court used Texaco's (producer-pipeline) industrial sales as the first sales controlled by the NGPA instead of the wellhead intracorporate transfer as the "first sale" under NGPA. It is

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[3] *Amoco Production Co. vs. Hodel*, 627 F.Supp. 1375 (W.D. La. 1986) *appeal docketed*, No. 86-4168 (5th Cir. Mar. 11, 1986).

submitted that under this Court's holding in the *Mid Louisiana* case, the Louisiana Supreme Court erred; therefore writs should be granted to review this holding.

CONCLUSION

The Louisiana Supreme Court decision affects the State of Louisiana directly, as a royalty owner, and indirectly, through the effects on private royalty owners and the natural gas industry in Louisiana. This decision is at odds with the Natural Gas Policy Act; the rulings of this Court and other federal courts; and the pronouncements of the Federal Energy Regulatory Commission. For the reasons put forward in this Brief, the State of Louisiana urges that the Petition of the Louisiana Land and Exploration Company for a Writ of Certiorari be granted.

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